PRESIDENT'S COLUMN

(Editor's Note: The following remarks were delivered by Joseph H. Johnson, Jr., as he assumed the presidency of the Association on October 5, 1988, in Chicago.)

I realized last year when I was chosen as your President-Elect that Dean Pope, Sharon White and Jim Perkins would be "hard acts to follow." But I hoped—and, in an euphoric moment, even thought—that 1988-89 would be an easy, good and uneventful year for bond lawyers generally and for NABL. Surely, I thought, with the Tax Reform Act of 1986 behind us, the Treasury would propose and have in place by October, 1988, reasonable and sensible regulations relating to those provisions of the Federal tax law that concern us. Again, with misguided euphoria, I thought that by October, 1988, the *South Carolina* case would be decided, if not favorably for South Carolina, at least in a more-or-less neutral way that would not wholly obliterate the concept that the income tax exemption of interest on governmental bonds of state and local government units was entitled to some constitutional protection.

With all this as a predicate, surely—I thought—1988-89 would be a year in which we could concentrate on improving and perhaps expanding our already first-rate programs of continuing legal education, and generally on sharpening our skills as bond lawyers, without having our attentions diverted by extraneous legislative, judicial and political developments.

I need not tell this group how badly mistaken I was. To the extent that we have any guidance from the Treasury concerning the 1986 law, it would have bond counsel relegated to such serious activities as counting pay telephones and soft drink vending machines in a proposed bond-financed public school facility. We have no rebate regulations; we in fact have no guidance from the Treasury concerning rebate except various statements indicating that the rebate regulations, if and when they are promulgated, will bear little if any resemblance to the only rebate regulations that now exist. We also have *proposed* technical correction provisions that in their zeal to cure abuses perceived by the Treasury under the 1986 law result in significant overkill and almost "throw out the baby with the bath water." Further, we have Congressman Donnelly's bill that would limit issuance expenses for all tax-exempt issues and that would prohibit issuers from paying so-called "excess" costs with non-bond proceeds, on pain of loss of tax exemption. And, on top of it all, we are now advised by the Supreme Court of the United States that states and local governments, in order to avoid burdening their taxpayers and ratepayers with the increased taxes and rates that will inevitably result from the issuance of taxable bonds, must henceforth depend upon the tender mercies of the legislative and executive branches of the Federal government: the same people that brought us the overkill of the 1986 act and the overkill of certain of the existing tax regulations and rulings.

As if all of this were not enough, we also now have a report from the SEC generally critical of municipal bond disclosure and impliedly threatening all sorts of dire consequences unless we all do better in an area where there has been, in the last 12 to 15 years, what I consider to be unparalleled improvement.

What can NABL and we do about all this? Our Committee on Administrative Policy will continue to work with the Treasury in an effort to develop tax regulations that make sense and can be readily and easily administered. In particular, both that committee and our Special Committee on Rebate will, if and when the promised arbitrage regulations appear, do what they can to insure intelligible regulations, regulations that states and localities can work with, without the expenditure of enormous amounts of money and time. We shall, with the support of President-Elect Ted Hester, our Committee or Legislative Policy and affected public interest groups, with valuable assistance from our own increased Washington presence in the person of Amy Dunbar (our Director of Governmental Affairs), and—I hope—along with the leadership of the prestigious Anthony Commission on Public Finance (two of whose members are also members of your Board), also continue to press for certain changes in law that practically everybody agrees are needed. As an example, we may suggest such changes in law in the arbitrage rebate area as are necessary for fair treatment of state and local government units and as at the same time meet the legitimate aims of the Federal government in precluding undue early issuances, over-issuances and transactions that are purely and simply arbitrage-motivated, recognizing that the latter type transactions tend to reflect unfavorably both on our state and local governmental clients and on us.

In the area of securities law, our Special Committee on Securities Law and Disclosure will examine the WPPSS Report and will recommend to the Board whatever response and action they consider appropriate. We shall continue our amicus efforts in the *Bank South* case, a case where an 11th Circuit panel—by a 2 to 1 vote—further and dangerously extended the "fraud on the market" theory, which is itself arguably an unsound concept.

These various developments in the securities law area—of which the WPPSS Report is only the latest—seem to be the building blocks to support a "demand" for mandatory registration of state and local governmental obligations. The impact of such a requirement would be devastating. It would literally force hundreds and thousands of smaller local governmental units from the municipal bond market and dramatically increase the financing expenses of the rest. It would require an enormous expansion of the staff of the SEC, particularly in view of the fact that many of the relevant disclosure items that relate to offerings of municipal bonds are peculiarly matters of state and local government law and regulations, areas with which the SEC staff has little familiarity. Bear in mind that not only do we have fifty separate states but also that in each one of those fifty states there are a myriad of different laws, ordinances and regulations that relate to particular cities, counties, state and local government authorities and other local government units. Perhaps those of us who act as bond counsel for the many smaller local governmental units that would be forced out of the market by mandatory SEC registration could obtain employment as SEC reviewers! Certainly we shall be needed, because the staff of the SEC, while generally a high caliber one, does not in my judgment have the necessary background and experience in local government law to do the job in this area. It is those of us in this room and our compatriots who have those skills and experience and who (by-and-large) are effectively using them in order that our clients may discharge their disclosure responsibilities to the investing public.

What can we do, in a broader sense, to prevent our states from becoming mere provinces of the Federal government, wholly and entirely subordinate to dictates from Washington? You have all doubtless read of the response of various organizations suggesting a constitutional amendment to reverse the result of the *South Carolina* case. To date, your Board has taken no position on such a proposed amendment. In the first place, there are numerous proposed constitutional amendments floating around, and none of them has yet seemed to gain universal acceptance by public interest groups and others concerned. In the second place, tax exemption is only one of several areas in which traditional concepts of federalism and comity between the state and Federal governments have been largely obliterated. However, in order that NABL and we not be "left at the gate," I propose to create a Special Committee or Task Force on Federalism to monitor developments and to make recommendations to the Board for action in this important area. This Committee will be specifically charged with keeping a close watch on proposed constitutional amendments dealing with tax-exemption and with from time to time making recommendations to the Board. But it will also be charged with consideration of issues of federalism in a broader sense, all with the objective of restoring needed balance to relations between the states and the Federal government.

Now, I want to share with you some ideas on what we can do to improve our performance as well as our image. The Association has recently been contacted by representatives of various commercial banks that act as trustee under state and local government bond indentures. These banks are concerned, and justifiably so, with bond documents that are ambiguous at best and that—at worst—"don't work," with bond documents that are presented to them only days before a bond closing, and with bond documents presented to them with what are effectively "take it or leave it" ultimatums. While not all this is necessarily the result of actions by bond lawyers and while I am sure that many of us can cite instances of bond trustee performance that was perhaps not up to standard, those are not in my judgment appropriate responses to these legitimate concerns of trustee banks.

I am concerned, and I believe your Board is concerned, that in our zeal to cover all the bases in a tax sense and in our zeal to respond promptly to the needs of our clients, we do not lose sight of one of our primary goals: that of producing clear, workable and unambiguous bond documents. Let us therefore do two things: *first*, let us double our efforts and hone our skills so that persons cannot even raise questions concerning our work product; and *second*, let us at the same time insist that bond counsel is a member of a financing task force on a par with underwriters, financial advisors, accountants, feasibility consultants and other professionals and let us insist on schedules and other considerations that are consistent with this view.

Without in any way demeaning the work performed by our good friends in the banknote printing industry, I suggest to you that some non-lawyer participants in the local government finance community consider the role of bond counsel in a financing transaction to be about on a par with that of the bond printer. I also suggest that some (though by no means all) of these participants seem to think that since Peter Whiteside and his competitors in the banknote industry can print a complicated multi-modal debt instrument in two or three days, we as lawyers are entitled to just about the same amount of time to produce ever more complicated and complex supporting documents. If we do not disabuse them of this notion and